Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1023

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JACK AND WANDA BERNSTEIN,

Petitioners,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, First District — Third Division

PETITIONERS' REPLY BRIEF

CARLO E. POLI *
ALLEN C. ENGERMAN
JEFFREY A. BROWN
ENGERMAN, BROWN & POLI, LTD.
3500 Xerox Centre
55 West Monroe Street
Chicago, Illinois 60603
(312) 781-1111
Attorneys for Petitioners

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PETITIONERS' REPLY BRIEF	1
CONCLUSION	4

TABLE OF AUTHORITIES

CASES CITED	PAGE
Hicks on Behalf of Feiock v. Feiock, ___ U.S. ___, 107 S.Ct. 259 (1986)	3
In re Grand Jury Investigation No. 78-184, 642 F.2d 1184 (9th Cir. 1981), *aff'd, sub nom. United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983)	3
Matter of Special April 1977 Grand Jury, 581 F.2d 589 (7th Cir. 1979), *cert. denied, sub nom. Scott v. United States*, 439 U.S. 1046 (1979)	4
Murphy v. Hunt, 455 U.S. 478 (1982)	3, 4

STATUTES	
Illinois Revised Statutes Chapter 120, Section 440 *et seq.* (1985)	1

PETITIONERS' REPLY BRIEF

The State requests denial of the petition for a writ of certiorari, contending that this case is moot. *Brief In Opposition*, pp. 4-5.

The State is correct that the three year statute of limitations has expired for any crimes that the Bernsteins may have committed under the Illinois Retailers' Occupation Tax Act, Ill. Rev. Stat. Ch. 120, §440 *et seq.* (1985) ("sales tax"). *Id.* But, in the same breath the State contends that the Bernsteins may be prosecuted for "similar crimes" for which the limitations period, according to the State, has not expired. *Id.*, p. 4. The State asserts that one such crime is any violation of the Illinois Income Tax Act which may have taken place for the tax years 1983 or 1984. *Id.*

While not relinquishing the possibility that it may indict the Bernsteins for these "similar crimes" and not assuring this Court that it will not enforce the subpoena at issue, the State contends that this case is moot ". . . because there is no current grand jury investigation for crimes under [the Income Tax] act. . ." and that, therefore, ". . . prosecution pursuant to the instant grand jury can likewise not ensue." *Id.*

There is a blatant inconsistency on the face of the State's brief, however. In the first paragraph of its argument, the State acknowledges that the instant grand jury is, in fact, investigating ". . . the possibility of crimes by petitioners, in violation of the . . . Illinois Income Tax Act for the years 1982, 1983 and 1984. . ." *Id.*, p. 3. Indeed, all along the State has contended that the investigation

was for possible violations of both state sales and income tax laws. *See, e.g.*: R. 27.[1]

In addition to the foregoing, the State has commenced two civil proceedings against the Bernsteins to collect any taxes that may be due. The first pertains to the tax years 1982 through 1984; the second, for the tax years 1985 and 1986.

The State had successfully argued in the courts below that it could force the Bernsteins to produce documents pertaining to tax years which were even then beyond the sales tax statute of limitations for criminal violations. *See*: Appellate Court's decision in the Petition at App. 13-14. As such, if the petition herein is denied, the State will argue that the mandate of the Appellate Court directs the Bernsteins to respond to the subpoena, notwithstanding any limitations period. The State may then give the documents to the present grand jury for its *current* investigation of criminal income tax violations; give them to another grand jury for an investigation of "similar crimes;" or give them to its civil division for use in the civil proceedings.

The State's brief overlooks the one fact that is of paramount importance: in the final analysis, this case is an appeal of a trial court's order which held the Bernsteins in contempt for their failure to comply with the subpoena. *See*: Petition, App. 29-30. Though stayed pending appeal, this order imposes a $50.00 *per diem* fine upon the Bernsteins until they produce the documents at issue. *Id.* Al-

---

[1] R. 27 is the State's initial brief in the trial court wherein the State asserted: "[The Bernsteins] are *presently* under investigation by the Illinois Department of Revenue for criminal violations of the Illinois Retailers' Occupation Tax *and Income Tax laws*." [Emphasis added].

though the State acknowledges that it can no longer criminally prosecute sales tax violations for 1982 through 1984, it never acknowledges that it will not seek enforcement of the trial court's order. The case is not moot unless the judgment of contempt is dismissed. *Hicks on Behalf of Feiock v. Feiock*, ____ U.S. ____, 107 S.Ct. 259, 260 (1986) (O'Connor, J., in chambers).

In general, a case becomes moot only when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). The trial court's order is still "live" and the Bernsteins have every interest in reversing it to avoid the stigma of the contempt citation, the fine and another attempt by the State to secure the documents before a different grand jury. Given the State's admissions that it is investigating "similar crimes" for which the statue of limitations may not have run, and given the pending civil enforcement proceedings, the State has every interest in keeping the order in tact.

A case is not moot if a trial court's order requiring disclosure of documents remains in effect. *Cf. In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1187-88 (9th Cir. 1981), *aff'd, sub nom. United States v. Sells Engineering, Inc.*, 463 U.S. 418, 422, n. 6 (1983). If evidence improperly obtained from a taxpayer by a grand jury may be transferred to a civil division of the government for use in civil proceedings, the controversy is ripe and the taxpayer's challenge to the disclosure order is proper. *Cf. Id.*

In summary, as long as the trial court's contempt order imposing a *per diem* fine remains in effect, this case and controversy is not moot.

In the alternative, should this Court agree with the State, then the "capable of repetition but evading review"

exception to the mootness doctrine is applicable. *See*: *Murphy v. Hunt, supra,* at 482. Conspicuous in its absence from the State's brief is any assurance that the State will not seek to procure an indictment of the Bernsteins for the "similar crimes" with a new subpoena from another grand jury. Should this happen, the parties will be "back to square one" with regard to the issues that will have evaded this Court's review in the instant appeal. *See*: *Matter of Special April 1977 Grand Jury,* 581 F.2d 589, 591 (7th Cir. 1979), *cert. denied, sub nom. Scott v. United States,* 439 U.S. 1046 (1979) (applying the "capable of repetition but evading review" doctrine in a continuing criminal investigation where future subpoenas subject to the same objections were likely).

CONCLUSION

WHEREFORE, the petitioners pray that their petition for a writ of certiorari to the Illinois Appellate Court, First District—Third Division be granted.

Respectfully submitted,

CARLO E. POLI *
ALLEN C. ENGERMAN
JEFFREY A. BROWN
ENGERMAN, BROWN & POLI, LTD.
3500 Xerox Centre
55 West Monroe Street
Chicago, Illinois 60603
(312) 781-1111

Attorneys for Petitioners

* Counsel of Record